



Date Issued: August 17, 1998
Case No.: 97-INA-285

In the Matter of:

BLANCHE C. BABB,
Employer,

on behalf of

LINDA ALEGRE,
Alien.

Appearances: Dan E. Korenberg
for Employer and Alien

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Employer above, a private householder, requests review of a denial of its application for alien labor certification by a U.S. Department of Labor Certifying Officer ("CO") for the position of Cook/Dietetic.¹ The issues on review are whether the position offered is a bona fide job that is full-time and clearly open to qualified U.S. workers in compliance with §§ 656.3, and 656.20(c)(8) and whether Employer lawfully rejected U.S. workers in compliance with § 656.21(b)(6). (AF 188-192).

The job opportunity, as stated by Employer, required two years of experience. Employee would work 40 hours a week with overtime as needed Tuesday through Saturday. The rate of pay is \$12.16 per hour and the job duties were described as follows:

Plan weekly menus and submit to employer for approval. Estimate consumption and requisition supplies and groceries. Season and prepare meals for employer and guests. Peel, wash and cut vegetables, meats, poultry, seafood, etc. Season

¹Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.

and cook soups, salads, casseroles, potpies, pastas, rice, stews, roasts, etc. Mix and bake breads, desserts, cookies, pies, etc. Set tables and serve meals. Clean and tidy kitchen and dining areas. Wash utensils, dishes and appliances.

(AF 233).

In the Notice of Findings (“NOF”), the CO questioned whether the household circumstances commanded a full time cook and asked Employer to provide specific information. (AF 225-231). The CO also raised the issue of Employer’s ability to pay the offered wage.² Further, the CO contends that U.S. applicants Winston Doss, Nancy Fineman, Micheal Salsbury, Paul Kaiden, and Adrian Cocor were not recruited in good faith and thus, were not rejected for lawful job-related reasons. After the applicants’ resumes were sent to Employer on July 11, 1995, Employer sent each qualified applicant a certified letter on July 27, 1995 inviting each of them to be interviewed on August 19, 1995. Two of the applicants failed to show on the 19th, and the other three contacted Employer to cancel the interview. The CO found that where Employer is recruiting a cook, and there are only a few local applicants, waiting almost three weeks after receiving their resumes does not indicate a good faith attempt to contact the applicants in a timely fashion. In order to correct this deficiency the CO directed Employer to submit persuasive documentation that Employer had rejected the above-mentioned applicants solely for job related reasons.

Employer submitted its rebuttal in the form of an affidavit, in which she argued that the preparation and cooking of the meals for the household alone require forty hours per week. In addition every other week the cook will be required to prepare and cook special meals for Employer’s immediate family whom Employer entertains at her home. (AF 193-215). Furthermore, Employer likes to celebrate holidays. Consequently she has a need for the services of a full-time domestic cook.

In addition Employer contends that it rejected the five aforementioned applicants for lawful job-related reasons. Employer asserts that the forgoing applicants were timely contacted within fourteen days after Employer received their resumes. Even more importantly, Employer was admitted to the hospital from July 27th through August 18th, therefore, she could not schedule an interview until August 19th. Each of the applicants was sent a letter inviting him/her for a personal interview. Mr. Cocor, Ms. Fineman and Mr. Kaiden subsequently called Employer and canceled the interview. Mr. Salsbury and Mr. Doss failed to appear on the scheduled date. Thus, Employer concluded that each applicant was no longer interested in the position. (AF 202-204).

The CO denied the application in the Final Determination (“FD”) for failure to document

² However, because Employer’s rebuttal on this issue was accepted in the Final Determination (“FD”), it is not before this Board and will not be discussed.

that there is a full-time position or that the labor certification position is truly open to any U.S. cook. The application was also denied based on the CO's conclusion that Employer did not sufficiently document attempts to contact and recruit the aforementioned applicants. Ergo, a good faith attempt to recruit them was not established. (188-192).

Administrative-judicial review was requested and the file was referred to this Board of Alien Labor Certification Appeals. Employer requests that the (FD) be reversed.

DISCUSSION

Section 656.20 (c)(8) requires that a job for which alien labor certification is sought "has been and is clearly open" to any qualified applicants as soon as possible after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. Otherwise, the U.S. applicants may lose interest in the position, which would allow an employer to intentionally delay contact in order to mangle the policy of preferring qualified U.S. workers over aliens for jobs in the U.S. ***Loma Linda Foods, Inc.***, 89-INA-289 (Nov. 26, 1991) (*en banc*). An employer must make efforts to contact qualified U.S. applicants in a timely fashion after the receipt of resumes from the state job service agency. Failure to timely contact the U.S. applicants indicates a failure to recruit in good faith.

For contact to be timely, the lapse of time between the receipt of the resumes and contact of the applicant must be no more than what is necessary to reasonably examine the credentials of the applicants. The reasonableness of the time taken to contact the applicants, is dependant upon the complexity of the position, whether the recruitment is local, and the number of persons who have applied for the position. *Id.* An unjustified delay in contacting U.S. applicants when it was feasible to contact the applicants earlier, is presumed to contribute to an applicant's unavailability. ***Creative Cabinet and Store Fixture***, 89-INA-181 (Jan. 24, 1990) (*en banc*).

In the case at bench, the credentials required for the position are minimal and Employer only received eight applicants from the Employment Development Office ("EDD"). (AF 236-237). Though it took approximately two weeks to contact the applicants,³ delays in contacting the applicants of 13 days from the receipt of the resumes, have been found to evidence a lack of good faith recruitment. ***Angeles Garden Service***, 93-INA-298 (Jan. 17, 1996).

A delay of two weeks may be a *de minimus* period of time, however, Employer bears the burden of proof to establish that it has recruited in good faith where the CO raises the issue. *See Id.*; ***Coma Unida***, 89-INA-289 (Nov. 26, 1991) (*en banc*); ***Robert White***, 94-INA-173 (Feb. 14, 1995) (attempt to contact U.S. applicants three weeks after receipt of resumes deemed unreasonable); ***Gabriel Rubanenko, M.D., Inc.***, 92-INA-370 (Dec. 22, 1993) (first attempt to

³We note that the CO started counting from the date on the EDD transmitted letter, we find this inaccurate and inappropriate. An employer cannot begin reviewing resumes and contacting applicants until it receives such from EDD, thus a CO must allow time for mailing.

contact applicants by telephone 16 days after receipt of resumes deemed unreasonable); *Jim Abrahams*, 92-INA-381 (July 28, 1993); *See also, Modern Kitchen Designs*, 92-INA-351 (Feb. 28, 1994) (three week delay contacting applicants for electrician's position deemed unreasonable); *Com-Spec Properties*, 91-INA-283 (Dec. 2, 1992); (17 day delay in the contact of U.S. applicants deemed unreasonable). Employer does not explain why it needed approximately two weeks to review eight resumes and contact the five applicants it found to be qualified. Employer only explained that no interviews could be scheduled until the 19th of August because he was hospitalized, but there is no reason given for the delay between receipt of resumes from EDD, and the 27th of July, when Employer mailed the letters of invitation to interview. Because Employer does not provide any documentation to establish that two weeks is a reasonable time to contact applicants in regards to this domestic cook position, we find that Employer failed to establish a good faith effort to recruit qualified U.S. workers.

Accordingly, the CO was correct in her determination that Employer did not recruit in good-faith. In light of this conclusion, it is unnecessary to consider the other grounds given by the CO for denial.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400

Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.